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INTERNATIONAL LAW COMMISSION
Forty-fifth session
2 May-22 July 1994

# INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

## Draft articles on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law: titles and texts of articles adopted by the Drafting Committee at its 45th and 46th sessions

## International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law

### [CHAPTER I

### GENERAL PROVISIONS]

### Article 1

### Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which create a risk of causing significant transboundary harm through their physical consequences.

GE.94-62892 (E)

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory of otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

* * *

[CHAPTER II

PREVENTION]

Article 11

Prior authorization

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required when a major change in the activity is planned.

Article 12

Risk assessment

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as on the environment of other States.

Article 13

Pre-existing activities

If a State after becoming bound by these articles, ascertains that an activity involving a risk of causing significant transboundary harm is being carried out in its territory or otherwise under its jurisdiction or control

without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending such compliance, the State may permit the continuation of the activity in question at its own risk.

Article 14*

Measures to prevent or minimize the risk

States shall take legislative administrative or other actions to ensure that all necessary measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

Article 14 bis [20 bis]

Non-transference of risk

In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

Article 15

Notification and information

If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm:

(a) the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required.

(b) When necessary, such notification may be effected through a competent international organization.

(c) Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Article 16

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to minimizing any risk of causing significant transboundary harm.

* The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident includes measures aimed at preventing or minimizing the harm after the occurrence of an accident.

Article 16 bis

Information to the public

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected with information relating to the risk and harm that might result from an activity subject to authorization in order to ascertain their views.

Article 17

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 18

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm and cooperate in the implementation of these measures.

2. States shall seek solutions based on an equitable balance of interests in the light of article 20.

3. If the consultations referred to in paragraph 1 fail to produce an agreed sclution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue its rights under these articles or any other treaty.

Article 19

Rights of the State likely to be affected

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing significant harm to it may request consultations under article 18.

2. The request shall be accompanied by a technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State of origin may be requested to pay an equitable share of the cost of the assessment.

Article 20

Factors involved in a balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of adverse effects of the activity on the environment and the availability of means of preventing or minimizing such risk or restoring the environment;

(d) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

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INTERNATIONAL LAW COMMISSION
Forty-fifth session
2 May-22 July 1994

# INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

## Draft articles on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law: titles and texts of articles adopted by the Drafting Committee at its forty-fifth and forty-sixth sessions

## International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law

## Corrigendum

Article 14

In the first line, insert a comma after the words "States shall take legislative" ...

Footnote to article 14

Replace the last two lines of the footnote by the following:

"accident, measures taken after the occurrence of an accident to prevent or minimize the harm caused".

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# DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION

Rapporteur: Mr. Peter Kabatsi

## CHAPTER I

## INTRODUCTION

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GE.94-63179 (E)

# CHAPTER I

## INTRODUCTION

1. The International Law Commission established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its forty-sixth session at its permanent seat at the United Nations Office at Geneva, from 2 May to 22 July 1994.

### A. Membership

2. The Commission consists of the following members:

Mr. Husain Al-Baharna (Bahrain)

Mr. Awn Al-Khasawneh (Jordan)

Mr. Gaetano Arangio-Ruiz (Italy)

Mr. Julio Barboza (Argentina)

Mr. Mohamed Bennouna (Morocco)

Mr. Derek William Bowett (United Kingdom)

Mr. Carlos Calero Rodrigues (Brazil)

Mr. James Crawford (Australia)

Mr. John de Saram (Sri Lanka)

Mr. Gudmundur Eiriksson (Iceland)

Mr. Nabil Elaraby (Egypt)

Mr. Salifou Fomba (Mali)

Mr. Mehmet Güney (Turkey)

Mr. Qizhi He (China)

Mr. Kamil Idris (Sudan)

Mr. Andreas Jacovides (Cyprus)

Mr. Peter Kabatsi (Uganda)

Mr. Mochtar Kusuma-Atmadja (Indonesia)

Mr. Ahmed Mahiou (Algeria)

Mr. Vaclav Mikulka (Czech Republic)

Mr. Guillaume Pambou-Tchivounda (Gabon)

Mr. Alain Pellet (France)

Mr. Pemmaraju Sreenivasa Rao (India)

Mr. Edilbert Razafindralambo (Madagascar)

Mr. Patrick Lipton Robinson (Jamaica)

Mr. Robert Rosenstock (United States)

Mr. Alberto Szekely (Mexico)

Mr. Doudou Thiam (Senegal)

Mr. Christian Tomuschat (Germany)

Mr. Edmundo Vargas Carreño (Chile)

Mr. Vladlen Vereshchetin (Russian Federation)

Mr. Francisco Villagran Kramer (Guatemala)

Mr. Chusei Yamada (Japan)

Mr. Alexander Yankov (Bulgaria)

3. Mr. Nabil Elaraby (Egypt) and Mr. Qizhi He (China) were elected at the 2331st meeting of the Commission, on 5 May 1994, to fill the casual vacancies in the Commission created by the election of Mr. Abdul Koroma and Mr. Jiuyong Shi to the International Court of Justice.

B. Officers

4. At its 2328th meeting on 2 May 1994, the Commission elected the following officers:

| | |
|---|---|
| Chairman: | Mr. Vladlen Vereshchetin |
| First Vice-Chairman: | Mr. Chusei Yamada |
| Second Vice-Chairman: | Mr. Francisco Villagran Kramer |
| Chairman of the Drafting Committee: | Mr. Derek William Bowett |
| Rapporteur: | Mr. Peter Kabatsi |

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as Chairman of the Commission, 1/ and the Special Rapporteurs. 2/ The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 2330th meeting, on 4 May 1994, set up for the present session a Planning Group to consider the programme, procedures and working methods of the Commission and its documentation and to report thereon

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1/ Namely, Mr. Julio Barboza, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Alexander Yankov.

2/ Namely, Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Robert Rosenstock and Mr. Doudou Thiam.

to the Enlarged Bureau. The Planning Group was composed of the following members: Mr. Chusei Yamada (Chairman), Mr. Awn Al-Khasawneh, Mr. Mohamed Bennouna, Mr. Carlos Calero Rodrigues, Mr. Gudmundur Eiriksson, Mr. Salifou Fomba, Mr. Mehmet Güney, Mr. Andreas Jacovides, Mr. Mochtar Kusuma-Atmadja, Mr. Ahmed Mahiou, Mr. Pemmaraju Sreenivasa Rao, Mr. Edilbert Razafindralambo, Mr. Robert Rosenstock, Mr. Doudou Thiam, Mr. Christian Tomuschat, Mr. Edmundo Vargas Carreño, Mr. Vladlen Vereshchetin and Mr. Alexander Yankov. Mr. Alain Pellet was ex officio member, as Chairman of the Working Group to consider the contribution of the Commission to the United Nations Decade of International Law.

6. The group was open-ended and other members of the Commission were welcome to attend its meetings.

### C. Drafting Committee

7. At its 2331st meeting, on 5 May 1994, the Commission appointed for the topic "The law of the non-navigational uses of international watercourses" a Drafting Committee which included, in addition to the Chairman of the Committee, Mr. Husain Al-Baharna, Mr. Carlos Calero Rodrigues, Mr. Nabil Elaraby, Mr. Salifou Fomba, Mr. Mehmet Güney, Mr. Kamil Idris, Mr. Peter Kabatsi, Mr. Guillaume Pambou-Tchivounda, Mr. Pemmaraju Sreenivasa Rao, Mr. Alberto Szekely, Mr. Francisco Villagran Kramer, Mr. Chusei Yamada and Mr. Alexander Yankov. Mr. Robert B. Rosenstock participated in his capacity as Special Rapporteur for the topic.

8. The Drafting Committee had the same composition for the topic "International liability for injurious consequences arising out of acts not prohibited by international law". Mr. Julio Barboza participated in his capacity as Special Rapporteur for the topic.

9. Also at its 2331st meeting, the Commission appointed for the topic "State responsibility" a Drafting Committee which included, in addition to the Chairman of the Committee, Mr. Awn Al-Khasawneh, Mr. Carlos Calero Rodrigues, Mr. James Crawford, Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Peter Kabatsi, Mr. Mochtar Kusuma-Atmadja, Mr. Ahmed Mahiou, Mr. Vaclav Mikulka, Mr. Alain Pellet, Mr. Robert Rosenstock and Mr. Christian Tomuschat. Mr. Gaetano Arangio-Ruiz participated in his capacity as Special Rapporteur for the topic.

10. Mr. Peter Kabatsi participated in the work of the Drafting Committee in his capacity as Rapporteur of the Commission.

### D. Working Group on a Draft Statute for an International Criminal Court

11. At its 2331st meeting, on 5 May 1994, the Commission re-established its Working Group on a Draft Statute for an International Criminal Court, bearing

in mind the request contained in paragraph 6 of General Assembly resolution 48/31, and appointed Mr. James Crawford as Chairman of the Working Group.

12. At its 2332nd meeting, also on 5 May 1994, the Commission approved the following composition for the Working Group: Mr. James Crawford (Chairman), Mr. Husain Al-Baharna, Mr. Awn Al-Khasawneh, Mr. Gaetano Arangio-Ruiz, Mr. Mohamed Bennouna, Mr. Derek William Bowett, Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Salifou Fomba, Mr. Mehmet Güney, Mr. Qizhi He, Mr. Kamil Idris, Mr. Pemmaraju Sreenivasa Rao, Mr. Edilbert Razafindralambo, Mr. Patrick Lipton Robinson, Mr. Robert Rosenstock, Mr. Christian Tomuschat, Mr. Vladlen Vereshchetin, Mr. Francisco Villagran Kramer and Mr. Alexander Yankov. Mr. Doudou Thiam participated in his capacity as Special Rapporteur for the topic "Draft Code of Crimes against the Peace and Security of Mankind". Mr. Peter Kabatsi participated in his capacity as Rapporteur of the Commission. The Working Group was open to every member who wished to participate.

### E. Secretariat

13. Mr. Hans Corell, Under Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General. Ms. Jacqueline Dauchy, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Manuel Rama-Montaldo, Senior Legal Officer, served as Senior Assistant Secretary to the Commission; Ms. Mahnoush H. Arsanjani and Mr. Mpazi Sinjela, Legal Officers, and Ms. Virginia Morris, Associate Legal Officer, served as Assistant Secretaries to the Commission.

### F. Agenda

14. At its 2328th meeting, on 2 May 1994, the Commission adopted an agenda for its forty-sixth session consisting of the following items:

1. Filling of casual vacancies.
2. Organization of work of the session.
3. State responsibility.
4. Draft Code of Crimes against the Peace and Security of Mankind.
5. The law of the non-navigational uses of international watercourses.

6. International liability for injurious consequences arising out of acts not prohibited by international law.

7. Programme, procedures and working methods of the Commission and its documentation.

8. Cooperation with other bodies.

9. Date and place of the forty-seventh session.

10. Other business.

15. The Commission considered all the items on its agenda. It held ... public meetings (2328th to ... th) and, in addition, the Drafting Committee of the Commission held 22 meetings, the Working Group on a draft statute for an international criminal jurisdiction held 27 meetings, the Enlarged Bureau of the Commission held 3 meetings and the Planning Group of the Enlarged Bureau held 3 meetings.

## G. General description of the work of the Commission at its forty-sixth session

16. At its forty-sixth session, the Commission achieved major progress on two topics on its agenda. Further to the request contained in paragraph 6 of General Assembly resolution 48/31, it adopted a draft statute for an international criminal court consisting of 60 articles with commentaries. It furthermore concluded the consideration of the topic "The law of the non-navigational uses of international watercourses" by adopting on second reading a complete set of draft articles on the topic, together with a draft resolution on transboundary confined groundwater.

17. In the framework of the topic "Draft Code of Crimes against the Peace and Security of Mankind", the Commission, bearing in mind paragraph 6 of General Assembly resolution 48/31 which requested it to continue its work "as a matter of priority" on the question of the draft statute for an international criminal court with a view to elaborating a draft statute, if possible at the current session, started its work with the consideration of the report of the Working Group on a Draft Statute for an International Criminal Court submitted by the Working Group to the plenary at the previous session and reproduced in an annex

to the report on that session. 3/ The Commission decided to re-establish the Working Group on the Draft Statute for an International Criminal Court and entrusted it with the task of reviewing the text elaborated the previous year, in the light of the discussion in the Commission and bearing in mind the comments of Governments submitted in writing or during the debate in the Sixth Committee. The Commission received from the Working Group a first report (A/CN.4/L.491 and Corr.1 (French only)) which contained a draft statute for an international criminal court. 4/ At a subsequent stage, the Commission had before it the final version of the Working Group's report which contained the text of a draft statute accompanied by commentaries (A/CN.4/L.491/Rev.2). 5/ The Commission ... 6/

18. Also in the framework of the topic "Draft Code of Crimes against the Peace and Security of Mankind", the Commission started the second reading of the draft Code adopted on first reading at its forty-third (1991) session. It had before it in this connection the twelfth report of the Special Rapporteur, Mr. Doudou Thiam (A/CN.4/460 and Corr.1), which covered draft articles 1 to 15. 7/ The Commission agreed that the work on the draft Code and on the draft statute for an international criminal court should be coordinated by the Special Rapporteur for the draft Code of crimes against the peace and security of mankind and by the Chairman and members of the Drafting Committee and Working Group, and that draft

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3/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10). The report was examined at the 2329th to 2334th meetings, held between 3 and 9 May 1994.

4/ The first version of the report of the Working Group (A/CN.4/L.491 and Corr.1 (French only)) was examined at the 2356th to 2361st meetings, held between 24 June and 5 July 1994.

5/ The final version of the Working Group's report was examined at the ... meetings, held on ... 1994.

6/ See Chapter II, Section B I below.

7/ The report was examined at the 2344th to 2347th and 2350th meetings, held between 27 May and 7 June 1994.

articles 1 to 15 of the draft Code should be referred to the Drafting Committee. 8/

19. The Commission considered the topic "The law of the non-navigational uses of international watercourses" on the basis of the second report of the Special Rapporteur, Mr. Robert Rosenstock (A/CN.4/462 and Corr.1 (Spanish only)) 9/ which contained, in addition to suggested amendments to draft articles adopted on second reading at the previous session by the Drafting Committee, new texts proposed by the Special Rapporteur for the draft articles not considered last year by the Drafting Committee, namely draft articles 7 and 8 to 32, as well as a new article on settlement of disputes. The Commission, on the basis of the recommendations of the Drafting Committee, adopted on second reading a complete set of draft articles on the topic and a draft resolution on transboundary confined groundwater. 10/ It also decided 11/, in conformity with article 23 of its Statute, to recommend the draft articles on the law of the non-navigational uses of international watercourses and the resolution on transboundary confined groundwater to the General Assembly, with a view to the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries. 12/

20. As regards the topic "State responsibility", the Commission considered Chapter II of the fifth report (A/CN.4/453/Add.2 and 3) and Chapter III of the sixth report (A/CN.4/461/Add.1) of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, both devoted to the question of the consequences of internationally wrongful acts characterized as crimes under article 19 of

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8/ See Chapter II, Section B II below.

9/ The report was examined at the 2334th to 2338th meetings, held between 9 and 16 May 1994.

10/ The recommendations of the Drafting Committee were examined at the 2353rd to 2356th meetings, held between 21 and 24 June 1994.

11/ The decision was taken at the ... meeting, on .. July 1994.

12/ See Chapter III below.

Part One of the draft articles. 13/ It also considered Chapter II of the sixth report (A/CN.4/461 and Add.2 and Corr.1) which was devoted to a reappraisal of the pre-countermeasures dispute settlement provisions so far envisaged for the draft on State responsibility. 14/ On the basis of the recommendations of the Drafting Committee as submitted by the Committee at the previous and current sessions, 15/ the Commission provisionally adopted articles 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures). 16/ The Commission did not take action on article 12 (Conditions relating to resort to countermeasures) at this stage and may have to review article 11 in the light of the text it will eventually adopt for article 12. 17/

21. As regards the topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission had before it the tenth report (A/CN.4/459) of the Special Rapporteur, Mr. Julio Barboza. The report was introduced by the Special Rapporteur 18/ but its consideration was deferred to next year. On the basis of the recommendations of the Drafting Committee as submitted by the Committee at the previous and current sessions, the Commission provisionally adopted articles 1 (Scope of the present articles), paragraphs (a), (b) and (c) of article 2 (Use of terms), article 11 (Prior authorization), article 12 (Risk assessment), article 13 (Unauthorized activities), article 14 (Measures to prevent or minimize the risk), article 14 bis [20 bis] (Non-transference of risk), article 15 (Notification and information), article 16 (Exchange of information), article 16 bis (Information

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13/ This aspect was considered at the 2338th to 2343rd and 2348th meetings, held between 13 May and 2 June 1994.

14/ This aspect was considered at the 2353rd meeting on 21 June 1994.

15/ The recommendations of the Drafting Committee were considered at the 2366th and 2367th meetings, held on 13 and 15 July 1994.

16/ For the text of these articles, see footnote ... below.

17/ See Chapter IV below.

18/ At the 2351st meeting, held on 10 June 1994.

to the public), article 17 (National security and industrial secrets), article 18 (Consultations on preventive measures), article 19 (Rights of the States likely to be affected) and article 20 (Factors involved in an equitable balance of interests). 19/ 20/

22. Matters relating to the programme, procedures and working methods of the Commission and its documentation were discussed in the framework of the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant recommendations of the Commission are to be found in the last chapter of the report which also deals with cooperation with other bodies and with certain administrative and other matters.

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19/ The recommendations of the Drafting Committee were considered at the 2362nd to 2366th meetings, held between 8 and 13 July 1994.

20/ See Chapter V below.

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Forth-sixth session
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## DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION

Rapporteur: Mr. Peter Kabatsi

## CHAPTER I

## INTRODUCTION

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# CHAPTER I

# INTRODUCTION

1. The International Law Commission established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its forty-sixth session at its permanent seat at the United Nations Office at Geneva, from 2 May to 22 July 1994.

## A. Membership

2. The Commission consists of the following members:

Mr. Husain Al-Baharna (Bahrain)

Mr. Awn Al-Khasawneh (Jordan)

Mr. Gaetano Arangio-Ruiz (Italy)

Mr. Julio Barboza (Argentina)

Mr. Mohamed Bennouna (Morocco)

Mr. Derek William Bowett (United Kingdom)

Mr. Carlos Calero Rodrigues (Brazil)

Mr. James Crawford (Australia)

Mr. John de Saram (Sri Lanka)

Mr. Gudmundur Eiriksson (Iceland)

Mr. Nabil Elaraby (Egypt)

Mr. Salifou Fomba (Mali)

Mr. Mehmet Güney (Turkey)

Mr. Qizhi He (China)

Mr. Kamil Idris (Sudan)

Mr. Andreas Jacovides (Cyprus)

Mr. Peter Kabatsi (Uganda)

Mr. Mochtar Kusuma-Atmadja (Indonesia)

Mr. Ahmed Mahiou (Algeria)

Mr. Vaclav Mikulka (Czech Republic)

Mr. Guillaume Pambou-Tchivounda (Gabon)

Mr. Alain Pellet (France)

Mr. Pemmaraju Sreenivasa Rao (India)

Mr. Edilbert Razafindralambo (Madagascar)

Mr. Patrick Lipton Robinson (Jamaica)

Mr. Robert Rosenstock (United States)

Mr. Alberto Szekely (Mexico)

Mr. Doudou Thiam (Senegal)

Mr. Christian Tomuschat (Germany)

Mr. Edmundo Vargas Carreño (Chile)

Mr. Vladlen Vereshchetin (Russian Federation)

Mr. Francisco Villagran Kramer (Guatemala)

Mr. Chusei Yamada (Japan)

Mr. Alexander Yankov (Bulgaria)

3. Mr. Nabil Elaraby (Egypt) and Mr. Qizhi He (China) were elected at the 2331st meeting of the Commission, on 5 May 1994, to fill the casual vacancies in the Commission created by the election of Mr. Abdul Koroma and Mr. Jiuyong Shi to the International Court of Justice.

B. Officers

4. At its 2328th meeting on 2 May 1994, the Commission elected the following officers:

| | |
|---|---|
| Chairman: | Mr. Vladlen Vereshchetin |
| First Vice-Chairman: | Mr. Chusei Yamada |
| Second Vice-Chairman: | Mr. Francisco Villagran Kramer |
| Chairman of the Drafting Committee: | Mr. Derek William Bowett |
| Rapporteur: | Mr. Peter Kabatsi |

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as Chairman of the Commission, [1] and the Special Rapporteurs. [2] The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 2330th meeting, on 4 May 1994, set up for the present session a Planning Group to consider the programme, procedures and working methods of the Commission and its documentation and to report thereon to

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[1] Namely, Mr. Julio Barboza, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Alexander Yankov.

[2] Namely, Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Robert Rosenstock and Mr. Doudou Thiam.

the Enlarged Bureau. The Planning Group was composed of the following members: Mr. Chusei Yamada (Chairman), Mr. Awn Al-Khasawneh, Mr. Mohamed Bennouna, Mr. Carlos Calero Rodrigues, Mr. Gudmundur Eiriksson, Mr. Salifou Fomba, Mr. Mehmet Güney, Mr. Andreas Jacovides, Mr. Mochtar Kusuma-Atmadja, Mr. Ahmed Mahiou,

Mr. Pemmaraju Sreenivasa Rao, Mr. Edilbert Razafindralambo, Mr. Robert Rosenstock, Mr. Doudou Thiam, Mr. Christian Tomuschat, Mr. Edmundo Vargas Carreño, Mr. Vladlen Vereshchetin and Mr. Alexander Yankov. Mr. Alain Pellet was ex officio member, as Chairman of the Working Group to consider the contribution of the Commission to the United Nations Decade of International Law.

6. The group was open-ended and other members of the Commission were welcome to attend its meetings.

C. Drafting Committee

7. At its 2331st meeting, on 5 May 1994, the Commission appointed for the topic "The law of the non-navigational uses of international watercourses" a Drafting Committee which included, in addition to the Chairman of the Committee, Mr. Husain Al-Baharna, Mr. Carlos Calero Rodrigues, Mr. Nabil Elaraby, Mr. Salifou Fomba, Mr. Mehmet Güney, Mr. Kamil Idris, Mr. Peter Kabatsi, Mr. Guillaume Pambou-Tchivounda, Mr. Pemmaraju Sreenivasa Rao, Mr. Alberto Szekely, Mr. Francisco Villagran Kramer, Mr. Chusei Yamada and Mr. Alexander Yankov. Mr. Robert B. Rosenstock participated in his capacity as Special Rapporteur for the topic.

8. The Drafting Committee had the same composition for the topic "International liability for injurious consequences arising out of acts not prohibited by international law". Mr. Julio Barboza participated in his capacity as Special Rapporteur for the topic.

9. Also at its 2331st meeting, the Commission appointed for the topic "State responsibility" a Drafting Committee which included, in addition to the Chairman of the Committee, Mr. Awn Al-Khasawneh, Mr. Carlos Calero Rodrigues, Mr. James Crawford, Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Peter Kabatsi, Mr. Mochtar Kusuma-Atmadja, Mr. Ahmed Mahiou, Mr. Vaclav Mikulka, Mr. Alain Pellet, Mr. Robert Rosenstock and Mr. Christian Tomuschat. Mr. Gaetano Arangio-Ruiz participated in his capacity as Special Rapporteur for the topic.

10. Mr. Peter Kabatsi participated in the work of the Drafting Committee in his capacity as Rapporteur of the Commission.

### D. Working Group on a Draft Statute for an International Criminal Court

11. At its 2331st meeting, on 5 May 1994, the Commission re-established its Working Group on a Draft Statute for an International Criminal Court, bearing

in mind the request contained in paragraph 6 of General Assembly resolution 48/31, and appointed Mr. James Crawford as Chairman of the Working Group.

12. At its 2332nd meeting, also on 5 May 1994, the Commission approved the following composition for the Working Group: Mr. James Crawford (Chairman), Mr. Husain Al-Baharna, Mr. Awn Al-Khasawneh, Mr. Gaetano Arangio-Ruiz, Mr. Mohamed Bennouna, Mr. Derek William Bowett, Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Salifou Fomba, Mr. Mehmet Güney, Mr. Qizhi He, Mr. Kamil Idris, Mr. Pemmaraju Sreenivasa Rao, Mr. Edilbert Razafindralambo, Mr. Patrick Lipton Robinson, Mr. Robert Rosenstock, Mr. Christian Tomuschat, Mr. Vladlen Vereshchetin, Mr. Francisco Villagran Kramer and Mr. Alexander Yankov. Mr. Doudou Thiam participated in his capacity as Special Rapporteur for the topic "Draft Code of Crimes against the Peace and Security of Mankind". Mr. Peter Kabatsi participated in his capacity as Rapporteur of the Commission. The Working Group was open to every member who wished to participate.

### E. Secretariat

13. Mr. Hans Corell, Under Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General. Ms. Jacqueline Dauchy, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Manuel Rama-Montaldo, Senior Legal Officer, served as Senior Assistant Secretary to the Commission; Ms. Mahnoush H. Arsanjani and Mr. Mpazi Sinjela, Legal Officers, and Ms. Virginia Morris, Associate Legal Officer, served as Assistant Secretaries to the Commission.

### F. Agenda

14. At its 2328th meeting, on 2 May 1994, the Commission adopted an agenda for its forty-sixth session consisting of the following items:

1. Filling of casual vacancies.
2. Organization of work of the session.
3. State responsibility.
4. Draft Code of Crimes against the Peace and Security of Mankind.
5. The law of the non-navigational uses of international watercourses.
6. International liability for injurious consequences arising out of acts not prohibited by international law.

7. Programme, procedures and working methods of the Commission and its documentation.

8. Cooperation with other bodies.

9. Date and place of the forty-seventh session.

10. Other business.

15. The Commission considered all the items on its agenda. It held ... public meetings (2328th to ... th) and, in addition, the Drafting Committee of the Commission held 22 meetings, the Working Group on a draft statute for an international criminal jurisdiction held 27 meetings, the Enlarged Bureau of the Commission held 3 meetings and the Planning Group of the Enlarged Bureau held 3 meetings.

## G. General description of the work of the Commission at its forty-sixth session

16. At its forty-sixth session, the Commission achieved major progress on two topics on its agenda: it adopted a draft statute for an international criminal court, consisting of 60 articles with commentaries, and concluded the consideration of the topic "The law of the non-navigational uses of international watercourses" by adopting on second reading a complete set of draft articles.

17. In the framework of the topic "Draft Code of Crimes against the Peace and Security of Mankind", the Commission re-established the Working Group on the Draft Statute for an International Criminal Court and entrusted it with the task of reviewing the text elaborated the previous year[3]. The Commission received from the Working Group three reports, the last of which contained the text of a draft statute accompanied by commentaries (A/CN.4/L.491/Rev.2 and Add.1 to 3). [4] The Commission ... [5]

18. In the framework of the same topic, the Commission started the second reading of the draft Code adopted on first reading at its forty-third (1991)

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[3] Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10). The text was considered from the 2339th to 2343rd meetings, held between 3 and 9 May.

[4] The final version of the Working Group's report was examined at the ... meetings, held on ... 1994.

[5] See Chapter II, Section B I below.

session. It had before it the twelfth report of the Special Rapporteur, Mr. Doudou Thiam (A/CN.4/460 and Corr.1), which covered draft articles 1 to 15. [6] After considering these articles in plenary, the Commission referred them to the Drafting Committee. [7]

19. The Commission considered the topic "The law of the non-navigational uses of international watercourses" on the basis of the second report of the Special Rapporteur, Mr. Robert Rosenstock (A/CN.4/462 and Corr.1 (Spanish only)). [8] The report contained, in addition to a few amendments to draft articles adopted on second reading at the previous session by the Drafting Committee, new texts proposed by the Special Rapporteur for the draft articles not yet considered by the Drafting Committee, namely draft articles 7 and 8 to 32, as well as a new article on settlement of disputes. The Commission, on the basis of the recommendations of the Drafting Committee, adopted on second reading a complete set of draft articles on the topic and a resolution on transboundary confined groundwater. [9] It also decided [10] to recommend the draft articles on the law of the non-navigational uses of international watercourses and the resolution on transboundary confined groundwater to the General Assembly, and recommended the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries on the basis of the draft articles. [11]

20. As regards the topic "State responsibility", the Commission considered: (1) Chapter II of the fifth report (A/CN.4/453/Add.2 and 3) and Chapter III of the sixth report (A/CN.4/461/Add.1) of the Special Rapporteur,

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[6] The report was examined at the 2344th to 2347th and 2350th meetings, held between 27 May and 7 June 1994.

[7] See Chapter II, Section B II below.

[8] The report was examined at the 2334th to 2338th meetings, held between 9 and 16 May 1994.

[9] The recommendations of the Drafting Committee were examined at the 2353rd to 2356th meetings, held between 21 and 24 June 1994.

[10] The decision was taken at the ... meeting, on .. July 1994.

[11] See Chapter III below.

Mr. Gaetano Arangio-Ruiz, both devoted to the question of the consequences of internationally wrongful acts characterized as crimes under article 19 of Part One of the draft articles. [12]; and (2) Chapter II of the sixth report (A/CN.4/461 and Add.2 and Corr.1) which presented a reappraisal of the pre-countermeasures dispute settlement provisions so far envisaged for the draft on State responsibility. [13] On the basis of the recommendations of the Drafting Committee as submitted at the previous and current sessions, [14] the Commission provisionally adopted articles 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures). [15] The Commission deferred action on article 12 (Conditions relating to resort to countermeasures) at this stage and decided that it may have to review article 11 in the light of the text it will eventually adopt for article 12. [16]

21. As regards the topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission had before it the tenth report (A/CN.4/459) of the Special Rapporteur, Mr. Julio Barboza. The report was introduced by the Special Rapporteur [17] but its consideration was deferred to next year. On the basis of the recommendations of the Drafting Committee, as submitted at the previous and current sessions, the Commission provisionally adopted a set of 10 articles, numbered 11 to 20, containing the provisions on prevention intended to form part of Chapter II of the draft articles. The Commission also adopted consequential changes in

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[12] This aspect was considered at the 2338th to 2343rd and 2348th meetings, held between 13 May and 2 June 1994.

[13] This aspect was considered at the 2353rd meeting on 21 June 1994.

[14] The recommendations of the Drafting Committee were considered at the 2366th and 2367th meetings, held on 13 and 15 July 1994.

[15] For the text of these articles, see footnote ... below.

[16] See Chapter IV below.

[17] At the 2351st meeting, held on 10 June 1994.

articles 1 (Scope of the articles) and 2 (Use of terms), previously adopted. [18] [19]

22. Matters relating to the programme, procedures and working methods of the Commission and its documentation were discussed in the framework of the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant recommendations of the Commission are to be found in the last chapter of the report which also deals with cooperation with other bodies and with certain administrative and other matters.

[List of questions to the General Assembly]

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[18] The recommendations of the Drafting Committee were considered at the 2362nd to 2366th meetings, held between 8 and 13 July 1994.

[19] See Chapter V below.